GLEN LAU LIAN SENG v. PERSONAL REPRESENTATIVE OF JESWANT NATARAJAN, DECEASED

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: WA-22NCC-346-10-2016]
19 JUNE 2017

CIVIL PROCEDURE: *Parties – Action against estate of deceased – Application for widow of deceased to be appointed as personal representative of estate of deceased – Widow of deceased applied to set aside appointment – Whether consent an express requirement under O. 15 r. 6A of Rules of Court 2012 – Whether consent a relevant consideration in determining whether court ought to exercise its discretion to grant order sought*

The plaintiff was a business partner of one Jeswant Natarajan ('deceased'). The plaintiff contended that he had made a number of friendly loans to the deceased which totalled in excess of RM1.2 million. After the death of the deceased, the plaintiff commenced the present action to recover the loans. As there was no executor or administrator appointed to represent the estate of the deceased, the plaintiff made an *ex parte* application under O. 15 r. 6A of the Rules of Court 2012 ('ROC') for an order that the defendant ('Ms Winkelmayer'), the widow of the deceased, be appointed as the representative of the estate of the deceased. The plaintiff argued that consent was not a requirement that had been set out anywhere in O. 15 r. 6A of the ROC, and that Ms Winkelmayer ought to be ordered to be appointed as the representative of the deceased estate solely on the basis that she was the next of kin. Accordingly, the plaintiff's application was allowed by the Registrar (the 'order'). Ms Winkelmayer subsequently applied to set aside the order, but the application was refused. Hence, Ms Winkelmayer appealed against this decision of the Registrar. The issues that arose for determination was the manner in which the court was to exercise its discretion to appoint a person as a representative pursuant to O. 15 r. 6A(4) of the ROC.

Held (allowing appeal with costs; setting aside orders of Registrar):

(1) Although consent is not an express requirement of O. 15 r. 6A of the ROC, consent is a relevant consideration in determining whether or not the court ought to exercise its discretion to grant the order sought. The basic proposition is this: if the court orders that a person acts as a personal representative of the estate of a deceased in proceedings against such estate, that person will, in the course of defending the action, incur liability for which he or she may not be made whole. The court ought to be slow to impose any liability on a third party in any action in circumstances where there exists no cause of action against that third

party. Thus, the existence of consent is a very important element in determining whether or not the court ought to grant the order appointing the nominated representative. Further, the mere fact that the person is a next of kin of the deceased does not justify the grant of the order. (para 8)

(2) Ms Winkelmayer had been separated from the deceased for some years prior to his passing and they were not in regular communication. This was of course not in and of itself determinative or decisive but was nonetheless one of the factors to be taken into account by the court. If they had been separated for a number of years in life, it would be an imposition to make her responsible for his affairs in death. Based on the circumstances of this case, it would not be just for Ms Winkelmayer to be so appointed as the personal representative of the deceased's estate. (para 8)

Case(s) referred to:

Hasiah Mat v. Johanariffin Din & Yang Lain [2009] 1 LNS 920 HC ***(refd)***
Kerajaan Malaysia v. Yong Siew Choon [2005] 4 CLJ 537 FC ***(refd)***
Lean v. Alston [1947] 1 All ER 261 ***(refd)***
Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor [2015] 6 CLJ 857 FC ***(refd)***
Pratt v. London Passenger Transport Board (1937) 1 All ER 473 ***(refd)***
Re Curtis and Betts [1887] WN 126 ***(refd)***
Yong Siew Choon v. Kerajaan Malaysia [2003] 2 CLJ 106 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 15 rr. 6A(4)(a), 7, 15

For the plaintiff - D Paramalingam; M/s Krish Maniam & Co
For the defendant - V Kumar; M/s Kumar Jaspal Quah & Aishah

Reported by Sandra Gabriel

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] This is an appeal to the judge in chambers against the decision of the Registrar of this court to refuse an application by a widow to set aside an order appointing her as the representative of the estate of her estranged departed husband. The issue turns on the relevant considerations that the court may take into account when making an order for a person to be the representative of a deceased pursuant to O. 15 r. 6A of the Rules of Court 2012 and the related subsidiary question of whether the court may order a nominated person to be the personal representative against such person's wishes.

Background Facts

[2] The plaintiff, Mr Glen Lau Lian Seng, was a business partner of the deceased, Mr Jeswant Natarajan. The plaintiff contended that he had made a number of friendly loans to Mr Natarajan in 2014, which loans totalled in excess of RM1.2 million. Unfortunately, Mr Natarajan passed away of a heart attack in April 2016. The plaintiff commenced this action after his death to recover the loans.

[3] The nominated representative, Ms Dorothea Winkelmayer, is the widow of the deceased. It is not disputed that Ms Winkelmayer had been separated from the deceased for several years. According to her affidavit evidence, she also had not spoken to the deceased for several years, at least until shortly before his passing.

[4] As there was no executor or administrator appointed to represent the estate of the deceased, the plaintiff made an *ex parte* application under O. 15 r. 6A of the Rules of Court 2012 for an order for Ms Winkelmayer to be appointed as the representative of the estate of her late husband. This application was heard by the Registrar of this court and was allowed on 24 November 2016.

[5] Ms Winkelmayer subsequently applied to set aside the order, but this application was refused. She has now appealed against this decision of the Registrar.

Analysis

[6] It is clear that O. 15 r. 6A(4) provides for the judicial power and discretion to order the appointment of any person to represent the estate of a deceased in proceedings against the estate of the deceased. In the absence of any such order, proceedings cannot be properly maintained against the estate of the deceased until and unless a grant of probate or administration has been made and the personal representative is made a party to such proceedings. In such circumstances, the official administrator may be appointed solely for the purposes of accepting service of process.

[7] The crisp issue for determination relates to the manner in which the court is to exercise its discretion to appoint a person as a representative pursuant to O. 15 r. 6A(4). In my view, the court may appoint any person to represent the estate of a deceased if it is just to do so, taking into account the relevant surrounding circumstances of the case.

[8] Based on the circumstances of this case and having regard to the evidence that is properly before this court, I find that it would not be just for Ms Winkelmayer to be so appointed, and I therefore allow the appeal and set aside the orders of the Registrar previously given. The factors that I have taken into consideration are as follows:

(a) No consent. Ms Winkelmayer has not consented to being appointed as the representative of her late husband's estate. As we shall see later, I am in agreement with counsel for the plaintiff that consent is not an express requirement of O. 15 r. 6A. Nonetheless, I am of the view that the fact of consent is a relevant consideration in determining whether or not the court ought to exercise its discretion to grant the order sought.

The basic proposition is this: if the court orders that a person acts as a personal representative of the estate of a deceased in proceedings against such estate, that person will, in the course of defending the action, incur liability for which he or she may not be made whole. The court ought to be slow to impose any liability on a third party in any action in circumstances where there exists no cause of action against that third party. Thus, to my mind, the existence of consent is a very important element in determining whether or not the court ought to grant the order appointing the nominated representative.

I leave open the possibility that the court may properly exercise its discretion under O. 15 r. 6A(4) to appoint a nominated representative against such person's wishes. However, it would appear to me that the circumstances must be such as to overwhelmingly favour the appointment of a person to act as the personal representative of an estate of a deceased in the absence of any consent of that person. Certainly, the mere fact that the person is a next of kin of the deceased does not justify the grant of the order;

(b) No indemnity. The plaintiff has not provided any indemnity to Ms Winkelmayer for any personal liability or expense that she may incur in representing the estate. In my view, if an appropriate indemnity is given to the nominated representative, the court could conceivably grant the order to appoint the nominee even in the absence of consent. Even here though, the court would be concerned that the nominated representative would act in the best interests of the prospective beneficiaries of the estate and would defend the claim in an appropriate manner. Such an order would lay the representative open to an action from the beneficiaries of the estate at a later stage, and hence careful consideration ought to be given to the surrounding circumstances even where an indemnity has been given;

(c) No evidence to suggest that Ms Winkelmayer is a beneficiary of the estate. Counsel for the plaintiff conceded that there is no evidence that is properly before this court that suggests that the assets of the estate exceed its liabilities and that Ms Winkelmayer would stand to benefit from the distribution of the assets of the estate. If such were the case, an argument might be mounted to justify the appointment of a nominated representative even in absence of consent. However, such is not the case in the present instance; and

(d) Ms Winkelmayer was separated from her husband. The undisputed evidence was that Ms Winkelmayer had been separated from the deceased for some years prior to his passing and that they were not in regular communication. This is of course not in and of itself determinative or decisive but is nonetheless one of the factors to be taken into account by the court. If they had been separated for a number of years in life, it would be an imposition to make her responsible for his affairs in death.

[9] Accordingly, having regard to the relevant circumstances of this case, I am of the view that it would not be just to order Ms Winkelmeyer to be appointed as the personal representative of the estate of her late husband.

[10] Counsel for the plaintiff sought to argue that consent is not a requirement that has been set out anywhere in O. 15 r. 6A, and that Ms Winkelmayer ought to be ordered to be appointed as the representative of her late husband's estate solely on the basis that she is the next of kin.

[11] I am in total agreement with Mr Paramalingam for the plaintiff that consent is not an express requirement of O. 15 r. 6A. However, with respect, the real issue is not whether consent must be obtained before the court may grant an order under O. 15 r. 6A(4)(a). Sub-rule 6A(4)(a) provides for a discretion of the court, and it is axiomatic that any such discretion must be exercised judicially. In my view, a court may exercise its discretion to grant an order sought under r. 6A(4)(a) where it is just to do so, having regard to all the relevant surrounding circumstances of the case. One of the relevant circumstances that the court may validly take into account is whether the nominated representative has consented to so act.

[12] In his grounds for decision, the learned Registrar criticised the reliance placed by learned counsel for Ms Winkelmayer on the two English cases of *Pratt v. London Passenger Transport Board*[1] and *Re Curtis and Betts*[2]. In these cases, it was held that the consent of the nominated representative was required before they may be ordered to represent the estate of the deceased. The learned Registrar distinguished these cases on two grounds, which are set out in the following passage from his decision:

> After reading both cases I find that such authorities provided can be distinguished on its application to the present case, In *Pratt*'s case, the case specifically deals with the appointment of a person representing the estate

A of a deceased person under Order 16 r. 46 of the Rules of the Supreme Court which is in *pari materia* with our O. 15 rule 15 of the Rules of Court 2012. As such the principle derives therein should rightly be applicable to an appointment made under O. 15 rule 15. Secondly, both in *Pratt*'s case and *Re Curtis*'s case, the person appointed whom consent was not obtained are not lawful next of kin of the deceased as in our case at hand. B In *Pratt*'s case, the person appointed is the Official Solicitor whereas in *Re Curtis*, it was the executor of Curtis that was appointed to represent the estate of Betts for the purpose of taxation proceeding against their deceased client R. Stainbank (Curtis and Bett acted as the solicitors for R. Stainbank).

C **[13]** I take the contrary view.

[14] Order 15 r. 6A allows actions to be brought against the estate of a deceased person in circumstances where there has not been any grant of probate or administration. Order 15 r. 7, by contrast, deals with the change of parties in an action that has already commenced, while O. 15 r. 15 deals D with the representation of deceased persons also where the action has already commenced.

[15] In my judgment, even though the cases of *Pratt v. London Passenger Transport Board* and *Re Curtis and Betts* did not concern the equivalent of our O. 15 r. 6A, they are nonetheless instructive for the following reasons: E

(a) like O. 15 r. 6A, O. 15 r. 15 of the Rules of Court 2012 does not expressly provide that the consent of the nominated representative be obtained prior to an order being given, but yet the courts in England have held that consent is a precondition for appointment. Accordingly, F it is no answer to state that no consent is required simply because there is no express provision requiring consent to be obtained;

(b) like O. 15 r. 6A, O. 15 r. 15 is concerned with the proper exercise of judicial discretion to appoint a person to act as a representative of a deceased person. That this is so can be seen from the judgment of Greer G LJ in *Pratt v. London Passenger Transport Board*:

> We were invited to make observations with reference to what ought to be the general rule for the court or a judge when applications are made to them in exercising their discretion under RSC Ord 16 r. 46. For my part I think it unwise to lay H down any general rule with regard to a matter which is a matter for discretion, because no two cases are the same. It may be that in some cases it would be held to be clearly inconvenient to make an order under this rule, whereas in other cases it might appear to be an adequate and proper method of dealing with the difficulty. I do not think we can, in advance, lay down I any rule as to how the discretion should be exercised in these cases.

If consent is a relevant consideration for the proper exercise of judicial discretion under O. 15 r. 15, then I see no reason why it should also not be the case under O. 15 r. 6A; and

(c) the rationale for consent to be obtained was also explained in the judgment of Greer LJ:

> Now, if the deceased person is somebody who would have had to incur expense in the litigation, his representative will necessarily have to incur expense in the litigation, and the court may well think that this is not a proper case in which to make an appointment of the Official Solicitor, or anybody else who may be considered suitable for the appointment under the provisions of the rule, without his consent. It seems to me quite impossible to suppose that this rule applies without the consent of the person who may have to be acting in the litigation and incurring expense in doing so, which may be partly disbursements or, if it is the Official Solicitor, his time and expenses as solicitor.

In my view, the rationale for consent would be equally applicable to an appointment of a representative under O. 15 r. 6A. The personal representative would in all likelihood incur expenditure in defending the suit. I cannot see how it would be just for the court to order a person to become a representative against his or her wishes (and as a consequence cause such person to incur costs), except perhaps if the nominated representative were in some way indemnified against the costs that he or she might incur, or if the circumstances were such as would overwhelmingly favour the appointment of such person even in the absence of consent.

[16] The second distinguishing feature identified by the learned Registrar in *Pratt v. London Passenger Transport Board* and *Re Curtis and Betts* was that they did not concern a nominated representative who was a next of kin.

[17] In my judgment, the fact that the nominated representative was not a next of kin does not change the analysis or the applicable principles. A next of kin would be well entitled to refuse the appointment, and in such circumstances, I would venture that there would have to be overwhelmingly compelling reasons for the court to appoint such a next of kin over his or her objections.

[18] In *Lean v. Alston*[3], the widow of a motorcycle driver had been asked to take out letters of administration and had refused to so do. The plaintiff, who was the pillion rider, had sued the owner of the motorcar that had collided with the motorcycle. The defendant sought to serve a third party notice upon the estate of the deceased motorcycle driver but could not initially do so because of the widow's refusal. In the following passage of the

judgment of the Court of Appeal, it will be seen that the court was of the view that the widow could validly decline from representing the estate of her deceased husband, even though she was the next of kin:

> The other argument on which I desire to make a few observations is this. It was pointed out that this is a matter for the discretion of the judge and that this court would not interfere with the exercise of a judge's discretion unless satisfied he had acted on some wrong principle. We were also informed that the judge refused to make the appointment because he did not think that the widow of the deceased motorcyclist, being a person beneficially interested in his estate, should have this representation "imposed on her". If that is what influenced the judge's mind, I think he did exercise his discretion on a wrong principle. The widow was invited to represent her husband's estate and she declined to do so, it may be for very good reasons not unconnected with the question of costs. For all we know, the widow may be glad that another person (who is, we understand, to be indemnified in respect of his costs by the defendant) should represent her husband's estate, and it may well be that in the long run it will save that estate the expense of a subsequent trial and possibly of an application to the Probate Division to appoint a personal representative.

[19] Even though *Lean v. Alston* also concerns a decision on the application of the English equivalent of O. 15 r. 15, as explained earlier, I am of the view that similar considerations apply under O. 15 r. 6A.

[20] It is also important to appreciate that O. 15 r. 6A provides for one exception to the general rule, which is that actions by or against an estate of a deceased can and should only be maintained after grant of probate or administration. The context within which O. 15 r. 6A operates is best explained by the following passage in the judgment of Gopal Sri Ram JCA in the Court of Appeal case of *Yong Siew Choon v. Kerajaan Malaysia*[4]:

> To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Ord 15 r. 6A provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in rule 6A (4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps.

[21] Now, it will be observed that the decision of the Court of Appeal was reversed on appeal to the Federal Court[5], but the passage quoted above remains a correct statement of the law.

[22] Because O. 15 r. 6A operates as a limited exception to the general rule, there is all the more reason that the court must satisfy itself that the circumstances of the case are such that the grant of an order appointing a person to act as a representative of the estate of a deceased person would be just. To hold that consent of the nominated representative is unnecessary simply because the requirement for consent has not been expressly spelled out in r. 6A would be to erode the general rule that letters of representation must first be obtained before an action may be commenced against or by the estate of a deceased. The general rule should not be honoured more in breach than in observance. There may well be circumstances where a court may find it just to order that a person be appointed as a representative pursuant to O. 15 r. 6A of the Rules of Court 2012 over his objections, but this cannot mean that consent is an irrelevance.

[23] I now turn to the authorities cited by learned counsel for the plaintiff:

(a) in *Poraviappan Arunasalam Pillay (Sebagai Pentadbir Harta Pesaka Nadarajah Sithambaram Pillai) v. Periasamy Sithambaram Pillai & Anor*[6], the appellant, who was seeking specific performance of an agreement for the purchase of land against the estate of the deceased vendor, had sought an order to appoint the deceased's brother as the representative of the estate. The Federal Court held that the brother had been duly appointed pursuant to O. 15 r. 6A of the Rules of Court 2012 and so the action for specific performance could validly be maintained against the estate. However, nowhere in this case was it mentioned that the brother had not consented to his appointment. Thus this case cited by counsel for the plaintiff does not assist us in determining the issues under consideration in our present case; and

(b) in *Hasiah Mat v. Johanariffin Din & Yang Lain*[7], the relevant issue before the court was whether the application for the appointment of the personal representative must be first be served upon each beneficiary of the estate of the deceased before any appointment may validly be made. Su Geok Yiam J held that no such requirement exists under O. 15 r. 6A of the Rules of Court 2012. Thus, here again the court was not concerned with the issue of whether the personal representative in question had consented to act.

[24] For the reasons set out above, I allow the appeal with costs.

Endnote:

1. [1937] 1 All ER 473
2. [1887] WN 126
3. [1947] 1 All ER 261

A 4. [2003] 2 CLJ 106, [2003] 2 AMR 682, [2003] 2 MLJ 150, [2003] 1 MLRA 53

5. See *Kerajaan Malaysia v. Yong Siew Choon* [2005] 4 CLJ 537, [2006] 2 AMR 93, [2006] 1 MLJ 1, [2005] 2 MLRA 185

B 6. [2015] 6 CLJ 857, [2015] 4 AMR 445, [2015] 4 MLJ 285, [2015] 4 MLRA 275

7. [2009] 1 LNS 920, [2010] 7 MLJ 61, [2009] 11 MLRH 83

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